



Agenda Date: 09/10/03
Agenda Item: 3A

STATE OF NEW JERSEY

Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.bpu.state.nj.us

OFFICE OF CABLE
TELEVISION

IN THE MATTER OF THE PETITION OF COMCAST)	ORDER MODIFYING INITIAL
CABLEVISION OF SOUTH JERSEY, INC. FOR A)	DETERMINATION UPON
RENEWAL CERTIFICATE OF APPROVAL TO)	INTERLOCUTORY REVIEW
CONTINUE TO CONSTRUCT, OPERATE AND)	
MAINTAIN A CABLE TELEVISION SYSTEM IN THE)	BPU Docket No. CE01050325
CITY OF ATLANTIC CITY, COUNTY OF ATLANTIC,)	OAL Docket No. CTV08055-02S
STATE OF NEW JERSEY)	

SERVICE LIST ATTACHED

BY THE BOARD:

The New Jersey Board of Public Utilities (Board) and its Office of Cable Television (OCTV), pursuant to N.J.S.A. 48:5A-1 et seq., have been granted general supervision and regulation of and jurisdiction and control over all cable television systems which operate within the State of New Jersey, subject only to the limitations of federal law. The within matter was opened to the Board by a petition, filed pursuant to N.J.A.C. 1:1-14.10, by Comcast Cablevision of South Jersey, Inc. (Comcast) for interlocutory review of the decision of Administrative Law Judge (ALJ) Edgar R. Holmes. Comcast seeks reversal of the determination by ALJ Holmes that the City of Atlantic City (Atlantic City or the City) may supplement the record through additional discovery and that the City may present into evidence information in addition to that which was available and considered by the City when it denied renewal of the Comcast cable television franchise. Atlantic City opposes the request for interlocutory review and asserts that the decision of ALJ Holmes should be affirmed.

On July 18, 2003, ALJ Holmes issued a decision in the above matter. On July 28, 2003, Comcast filed a request for interlocutory review under N.J.A.C. 1:1-14.10, at which time Comcast included both its procedural and substantive arguments, as required by the regulation. Atlantic City opposed the request, and filed procedural opposition papers on July 30, 2003. At the Board's regularly scheduled public agenda meeting, on August 6, 2003, the Board agreed to accept the matter for interlocutory review, and issued a Secretary's Letter to all parties indicating that the substantive matter would be heard before the Board on August 18, 2003. Based upon this determination, on August 8, 2003, Atlantic City filed its substantive responsive papers. On August 18, 2003, the Board determined that additional time would be appropriate and Ordered an extension until September 10, 2003. On the same day, Comcast submitted substantive papers in response to the City's filing. Based upon the rules regarding interlocutory review, as set forth at N.J.A.C. 1:1-14.10, the Board HEREBY FINDS that the responsive papers submitted by Comcast

are not authorized and HEREBY ORDERS that the papers submitted by Comcast on August 18, 2003 be refused and not included in the record.

The original renewal Certificate of Approval for Atlantic City was issued by the Board on May 4, 1994, to Sammons Communications of New Jersey, Inc. (Sammons). In February, 1996, the Board authorized the transfer, under Docket No. CM95080358, from Sammons to Lenfest Atlantic, Inc. d/b/a Suburban Cable (Suburban). Then, in January of 2000, the BPU approved the merger of Suburban Cable into Comcast Corporation, under Docket No. CM99110855. In each change, the rights and obligations were transferred as well, and the City was on notice as to the ownership transfers.

Under the authority granted by 47 U.S.C. §456, and based upon State statutes and regulations promulgated by the OCTV, the renewal of a municipal franchise may be started in one of two ways. First, either the municipality or the cable operator may start a municipal fact finding process, also known as an "ascertainment," by filing a notice with the OCTV and the other party sometime between 36 and 30 months prior to the expiration of the Certificate of Approval. N.J.A.C. 14:18-13.1(a)(1). If neither party gives the necessary notice, the cable television operator must nevertheless start the renewal process by filing an application for municipal consent between 12 and nine months prior to the expiration of the Certificate of Approval. N.J.A.C. 14:18-13.1(a)(2). In the event that the notice is filed, the municipality is required to conduct ascertainment proceedings to review the past performance of the cable television operator and to assess the future cable-related community needs and interests. N.J.A.C. 14:18-13.2(a). This process is designed to include the municipality, the cable operator, and the public, and to ensure that all parties have an opportunity to participate. Ibid. This process takes place in front of the municipal governing body or an advisory committee designated by the municipality, public hearings may be held, and transcripts of these hearings are required. N.J.A.C. 14:18-13.2(a)(1-3).

As a result of these hearings, and at least 12 months before the Certificate of Approval is set to expire, the municipality must issue a report to the governing body, with copies directed to both the OCTV and the cable operator, setting forth the conclusions reached in the ascertainment process. N.J.A.C. 14:18-13.2(c). This report must be made available to the public, ibid., and the issuance of this report starts the 90 day time period in which the cable operator must file its application for municipal consent, N.J.A.C. 14:18-13.2(d). A municipality that chooses to conduct an ascertainment but does not wish to issue a report must notify the OCTV with its reasons and rationale. N.J.A.C. 14:18-13.2(e). Additionally, in the event that a municipality does not file an ascertainment report at least 12 months prior to the expiration of the Certificate of Approval, the cable operator must file an application for municipal consent no later than nine months prior to the expiration. N.J.A.C. 14:18-13.3(a)(2).

The mandatory pre-proposal phase under N.J.A.C. 14:18-13.4 is then designed to provide the municipality with an option to issue a request for a proposal by scheduling a hearing, which is to be completed within 120 days of the application, and the municipality is then required to render a decision as to the application within 150 days from filing. N.J.S.A. 48:5A-23(b); N.J.A.C. 14:18-13.4(a)(1-5). Prior to acting upon the determination, the municipality has the right to require the applicant to submit information about "financial responsibility, technical competency and general fitness." N.J.S.A. 48:5A-27. Upon conclusion of this process, the municipality may complete the assessment and performance review process by either issuing a resolution recommending that the Board issue a preliminary assessment of denial including specific reasons, or by adopting an ordinance granting a municipal consent for renewal, which then serves as a request by the municipality for a proposal from the cable television operator. N.J.A.C. 14:18-13.4(b)(1-2). In the event of a denial, the cable television operator has 30 days to file a petition with the Board for a renewal Certificate of Approval in the absence of municipal consent. N.J.A.C. 14:18-13.5(a)(1).

The failure of the municipality to issue a consent ordinance or a recommendation of denial is deemed to be a recommendation of denial, and will be treated as such. N.J.A.C. 14:18-13.5(b).

The Board, upon receiving a recommendation of a preliminary assessment of denial, may transmit the matter to the Office of Administrative Law as a contested case, for a hearing to be held by an Administrative Law Judge. N.J.S.A. 14:18-13.7. Upon transmission, a hearing shall be held to determine if: 1) the cable television operator has substantially complied with the material terms of the existing franchise and with applicable law; 2) the quality of the cable television operator's service, including signal quality, response to customer complaints, and billing practices, but without regard to the mix, quality, or level of cable services or other services provided over the system, has been reasonable in light of community needs; 3) the cable television operator has the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the cable television operator's proposal; and 4) the cable television operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests. N.J.A.C. 14:18-13.7(a)(1-4). At least one public hearing must likewise be held. N.J.A.C. 14:18-13.7(b).

Against this regulatory framework, we turn to the current matter. Comcast's Certificate of Approval expired on February 27, 2000. As directed by N.J.A.C. 14:18-13.1(a), Suburban filed a notice seeking to begin the time frame for ascertainment, which was sent to the OCTV and the City on March 24, 1997, and which satisfied the 30 to 36 month time frame required by the rule. While the letter noted that Suburban would prefer to continue in an informal manner, the letter nevertheless invoked the formal requirements of ascertainment.

The ascertainment report required by the City was due February 27, 1999, or 12 months prior to the expiration date of the Certificate of Approval. N.J.A.C. 14:18-13.2(c). A report was not received in that time, and, as required by N.J.A.C. 14:18-13.3(a)(2), Suburban filed an application for municipal consent, on April 27, 1999. Following receipt of the application, the City held a public meeting on cable issues, on July 7, 1999, at which time Suburban was invited to speak. Comcast claims that Suburban notified the City of its inability to attend the meeting and asked for the hearing to be rescheduled until August. The City seemingly agreed to hold-over the discussions until the August meeting, but nevertheless opened the floor on July 7, 1999 to discussions concerning the cable issues. The "follow-up" meeting to provide Suburban an opportunity to speak does not appear to have taken place, and Suburban did not seek an additional opportunity to speak before the City. Nevertheless, on September 15, 1999, the City issued an ascertainment report, which was received by Comcast. This report, however, came some 7 months after the regulatory deadline, and was never filed with the OCTV, as required.¹ N.J.A.C. 14:18-13.2(c). Despite this, both parties continued to attempt to negotiate a municipal consent for almost a year following the July 7 hearing, during which time the Board approved the transfer of the Certificate of Approval from Suburban to Comcast. Finally, after negotiations broke down entirely, Comcast filed a petition seeking a Certificate of Approval in the absence of municipal consent before the Board on May 17, 2001. After an additional year of continued negotiations, the Board transferred the matter to the OAL on September 19, 2002, designating it as an "arbitrary refusal."

Once the matter had been transferred, the City filed a number of discovery requests upon Comcast, seeking information of a technical and financial nature. Comcast noted its belief that these discovery requests were beyond the scope of the hearing before the ALJ, and requested, via motion, for a determination that the discovery requests were inappropriate and that the hearing before the ALJ should be limited to only that information available to the City at the time of the filing

¹ The first copy of this report received by OCTV was attached to the pleading papers in this interlocutory review process.

of the application for municipal consent. The City opposed this motion, and ALJ Holmes determined that the scope of the hearing was such that the record must be allowed to be expanded. ALJ Holmes thus permitted the City to supplement the record “so that sufficient relevant and timely material can be presented in order to perform the analysis required by N.J.A.C. 14:18-13.7(6).” It is based upon this determination that Comcast has filed the present interlocutory review.

The ascertainment process was put into place to ensure the timely flow of information and to ensure that all parties to a franchise renewal had the opportunity to examine where the relationship stood in the present and explore options for the future. E.g., N.J.A.C. 14:18-13. While not made explicit in the regulations, failure to abide by the timelines imposed in the ascertainment process must have repercussions in order for the deadlines to have any significance. In this case, Atlantic City failed to take a number of necessary steps during the ascertainment process. Upon receipt of the notice of a formal ascertainment process being invoked, the City did not hold a public meetings or issue a report until five (5) months after the deadline, and three (3) months after Suburban filed for municipal consent. This failure made it impossible for Comcast’s application for municipal consent to address any of the issues of future needs raised in the ascertainment report or hearing.

Additionally, while N.J.S.A. 48:5A-27 allows Atlantic City to seek information about financial, technical and other general fitness issues, the time limit on these informational requests is “before acting upon [a municipal consent] application.” In this case, Atlantic City first requested the information only after the request for municipal consent had been effectively denied through inaction on the part of the City, and only once the matter had been transferred to the OAL for adjudication as a contested case. Thus, the request for information of this nature is significantly late.

Nevertheless, Atlantic City did submit to Suburban copies of its ascertainment report and transcript prior to Comcast filing its petition with the Board for a Certificate of Approval in the absence of municipal consent under a claim of an arbitrary refusal. While the City may not have submitted these documents in a timely fashion, Comcast was nevertheless aware of their content and cognizant of the issues the City believed needed to be addresses in the renewal process. Thus, these items formed the basis of the ongoing discussion between the entities. Comcast’s decision to continue negotiations despite the passing of the deadline for the filing of the arbitrary refusal, and its decision to extend the process for nearly two years, makes it inappropriate for Comcast to “disavow” any and all knowledge of the contents of these items.

Finally, the Board, in a previous decision on a similar interlocutory review, made explicit that the determination of an arbitrary refusal turns on the question of information available to the municipality at the time of its decision. In IMO the Application of TKR Cable Company / Tri-System for Renewal Certificates of Approval in New Brunswick, North Brunswick and Piscataway, BPU Docket Nos. CE94120570, CE94100472 & CE93090392, decided March 4, 1997, the Board determined that a cable operator, during the OAL hearing, could not introduce information that had not been made available to the municipalities to prove arbitrary denials on the part of the municipalities. Instead, the Board noted that, to “continually add evidence related to events subsequent to the municipal actions . . . would circumvent the administrative process and prevent finality in the matter. In addition, it would not provide an accurate description of the information available to the municipalities at the time of their respective actions.” Accordingly, the cable operator was not allowed to supplement the record with information beyond that provided to the municipalities during the ascertainment process. In much the same way, Atlantic City should be limited to seeking additional discovery only to those factual elements that were before the City during its belated ascertainment process. The failure to collect information in a timely manner is not a sufficient excuse to provide Atlantic City with the ability to, in essence, conduct the

ascertainment process after the cable operator has filed with the Board its application for a Certificate of Approval absent municipal consent. Atlantic City should not now have the opportunity for a second round of discovery when it did not avail itself to the first round.

Accordingly, based upon the above, the Board HEREBY FINDS that the scope of the proceeding currently before the OAL should be limited to that information available to the City prior to the May 21, 2001 filing of Comcast's petition for a Certificate of Approval without municipal consent, and to additional discovery limited to issues before the City at that time. The Board FURTHER FINDS that discovery on issues concerning the alleged technical failures and the financial health and profitability of Comcast are outside the scope of the hearing because they were not raised during the ascertainment process. The Board FURTHER FINDS that both parties were aware of the issues raised by the ascertainment report and the public hearing such that exclusion of the needs raised by the City in these documents would be inappropriate at this time. Therefore, the Board HEREBY GRANTS Comcast's petition for interlocutory review and HEREBY MODIFIES the decision of ALJ Holmes in this matter. The Board HEREBY ORDERS that the record in the current hearing should include the ascertainment report and transcript of the public hearing, and may be supplemented through discovery as to those issues before the City as of May 21, 2001, but that Atlantic City may not seek discovery on questions of technical sufficiency or any financial issues associated with the operation of Comcast, or any issues not explicitly raised prior to May 21, 2001.

DATED: September 11, 2003

BOARD OF PUBLIC UTILITIES
BY:

(signed)

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PRESIDENT

(signed)

FREDERICK F. BUTLER
COMMISSIONER

(signed)

CAROL J. MURPHY
COMMISSIONER

(signed)

CONNIE O. HUGHES
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ATTEST:

(signed)

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